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In his own way, every U.S. president has tried to mold the Supreme Court in his own political image. Washington stacked the Court with dedicated Federalists, Lincoln appointed men with strong pro-Union views and Franklin Roosevelt named New Deal loyalists. No president in history has outdone Richard Nixon. With four appointments in his first term alone, Nixon has already delivered on his promise to blunt the judicial revolution of the Warren Court. The new conservative majority has cut back on the rights of criminal suspects, largely ignored the constitutional demands of the poor and held firmly but narrowly to the desegregation line that the Warren Court drew in 1954. The Court has been transformed from a tribunal of unprecedented legal daring to one of modest aims and self-limiting accomplishments. It is no longer a bold, innovative institution and has abandoned, for the moment at least, the role of keeper of the nation's conscience.**

State courts may be on the verge of gaining new importance, if, in anticipation of the Supreme Court's retrenchment, state constitutions become a more important source of limitations on state power. In fact, state constitutions may provide the only outlet for judges and lawyers who disagree with the more deferential approach the Supreme Court may take toward legislation and other state action.***

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** J. SIMON, IN HIS OWN IMAGE, THE SUPREME COURT IN RICHARD NIXON'S AMERICA 288 (1973).

*** Bice, *Anderson and the Adequate State Ground*, 45 So. CAL. L. REV. 750, 766 (1972).

INTRODUCTION

During the 1960's there was widespread disaffection with the Supreme Court of the United States.[1] Doubtlessly some of the discontent was attributable to Warren Court decisions on legislative reapportionment[2] and prayer[3] and Bible reading[4] in the public schools. But in retrospect it seems clear that decisions defining the rights of criminal suspects caused the greatest amount of public concern.[5]

Certainly the Supreme Court was innovative in the criminal justice area. Between June 19, 1961, when the opinion in *Mapp v. Ohio*[6] was announced, and June 23, 1969, when *Benton v. Maryland*[7] was decided, this nation underwent a criminal procedure revolution. The revolution was in two parts. First, through a process of "selective incorporation,"[8] provisions of the Bill of Rights were held applicable to the states through the due process clause of the fourteenth amendment.[9] The "selective incorporation" cases interred the view that the constitutional rights of a person charged with crime in a state court are violated only when fundamentally unfair procedures are followed and firmly established the proposition that federal constitutional rights are to be enforced by the same standards in federal and state courts. Second, liberal interpretations of the Bill of Rights greatly expanded the scope of federal constitutional protections. The right to be free from unreasonable search and seizure, the privilege

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1 Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U.L. REV. 260, n.2 (1972).

2 Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

3 Engel v. Vitale, 370 U.S. 421 (1962).

4 Abington School District v. Schempp, 374 U.S. 203 (1963).

5 For a good account of the public furor created by these decisions, *see* F. GRAHAM, THE SELF-INFLICTED WOUND (1970).

6 367 U.S. 643 (1961).

7 395 U.S. 784 (1969).

8 The "selective incorporation" doctrine was formulated by Justice Brennan. Cohen v. Hurley, 366 U.S. 117 (1961) (dissenting opinion of Brennan, J.); Ohio *ex rel.* Eaton v. Price, 364 U.S. 236 (1960) (opinion of Brennan, J.). For a good analysis of the doctrine, see Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Rosen, *Contemporary Winds and Currents in Criminal Law, with Special Reference to Constitutional Criminal Procedure*, 27 MD. L. REV. 103 (1967).

9 Benton v. Maryland, 395 U.S. 784 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Washington v. Texas, 388 U.S. 14 (1967); Klopfer v. North Carolina, 386 U.S. 213 (1967); Pointer v. Texas, 380 U.S. 400 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Robinson v. California, 370 U.S. 660 (1962); Mapp v. Ohio, 367 U.S. 643 (1961).

against self-incrimination, and the right to counsel were construed to "restrain police from some unlawful practices which were previously regarded as routine."[10]

It is hardly news that the Supreme Court has changed since the innovative Sixties.[11] In cases involving obscenity,[12] juvenile justice,[13] loyalty oaths,[14] loss of nationality,[15] preinduction review of selective service board orders,[16] and federal injunctive[17] and declaratory[18] relief against state criminal prosecutions, the Burger Court has shown that its judicial philosophy is substantially different from that of the Warren Court. Nowhere is this change more evident than in the field of criminal procedure. Since June 23, 1969, when Warren E. Burger became the fifteenth Chief Justice, it has grown increasingly obvious that the Burger Court intends to reverse the trend of the past decade and to constrict rather than expand the rights of the accused. The Burger Court has given the imprimatur of the Constitution to nonunanimous jury verdicts in state criminal cases[19] and to use immunity in return for compelled incriminating testimony.[20] Important decisions of the Warren era extending the rights of the accused have been eviscerated by narrow interpretations[21] and by nonretroactive application.[22] In cases where an accused's rights were

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[10] Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 254 (1968).

[11] *See* J. SIMON, IN HIS OWN IMAGE, THE SUPREME COURT IN RICHARD NIXON'S AMERICA (1973).

[12] *Compare* Memoirs v. Massachusetts, 383 U.S. 413 (1966) *with* Miller v. California, 413 U.S. 15 (1973).

[13] *Compare In re* Gault, 387 U.S. 1 (1967) *with* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[14] *Compare* Whitehill v. Elkins, 389 U.S. 54 (1967) *with* Cole v. Richardson, 405 U.S. 676 (1972).

[15] *Compare* Afroyim v. Rusk, 387 U.S. 253 (1967) *with* Rogers v. Bellei, 401 U.S. 815 (1971).

[16] *Compare* Ostereich v. Selective Service Bd., 393 U.S. 233 (1968) *with* Fein v. Selective Service Sys., 405 U.S. 365 (1972).

[17] *Compare* Dombrowski v. Pfister, 380 U.S. 479 (1965) *with* Younger v. Harris, 401 U.S. 37 (1971).

[18] *Compare* Zwickler v. Koota, 387 U.S. 241 (1967) *with* Samuels v. Mackell, 401 U.S. 66 (1971).

[19] Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

[20] Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972); Kastigar v. United States, 406 U.S. 441 (1972).

[21] *E.g.*, Harris v. New York, 401 U.S. 222 (1971); Kirby v. Illinois, 406 U.S. 682 (1972).

[22] *E.g.*, Michigan v. Payne, 412 U.S. 47 (1973); Mackey v. United States, 401 U.S. 667 (1971); Williams v. United States, 401 U.S. 646 (1971).

plainly violated, convictions have nevertheless been upheld by generous construction of the harmless error doctrine.[23] Moreover, concurring and dissenting opinions by Chief Justice Burger and other recent appointees have indicated a desire to limit severely or overrule completely some of the controversial Warren Court decisions.[24]

Of course it would be an exaggeration to say that every decision of the Burger Court in the area of criminal procedure constitutes a retreat from the Warren era. The soundness of the "selective incorporation" cases seems unchallenged.[25] The Burger Court has extended the right to counsel to all offenses resulting in imprisonment,[26] breathed new life into the right to a speedy trial,[27] and declared unconstitutional warrantless electronic surveillance in domestic national security cases.[28] In 1972, with all four Nixon appointees dissenting, the Burger Court took a step the Warren Court had never dared to take when it invalidated the death penalty, at least as presently imposed.[29] Nevertheless, the consistency of views and voting records among the Nixon appointees,[30] the age and health of the activist Warren Court holdovers,[31] and the historical tendency of the Court to assume the

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[23] *E.g.*, Schneble v. Florida, 405 U.S. 427 (1972); Milton v. Wainwright, 407 U.S. 371 (1972).

[24] Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (concurring opinion of Powell, J.); United States v. Harris, 403 U.S. 573 (1971) (dissenting opinion of Blackmun, J.); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (dissenting opinion of Burger, C.J.).

[25] *But see* Apodaca v. Oregon, 406 U.S. 404 (1972).

[26] Argersinger v. Hamlin, 407 U.S. 25 (1972).

[27] Strunk v. United States, 412 U.S. 434 (1973); Barker v. Wingo, 407 U.S. 514 (1972); Dickey v. Florida, 398 U.S. 30 (1970).

[28] United States v. District Court, 407 U.S. 297 (1972).

[29] Furman v. Georgia, 408 U.S. 238 (1972).

[30] Analyzing the opinions written during the October 1971 term, Philip B. Kurland concluded:

> "The Chief Justice expressed the views of Justices Blackmun, Powell, and Rehnquist in every one of his opinions. Burger reciprocated this expression of confidence in the opinions of Rehnquist and, while never in dissent from the opinions of the other two members of his team, concurred specially with regard to Blackmun in 8 per cent of the latter's opinions, and with reference to 17 per cent of Powell's opinions. The proximity of views of Blackmun and Rehnquist were of similar magnitude."

Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181, 182-83. Kurland also discovered that Burger, Blackmun, Powell, and Rehnquist voted together "in 70.6 per cent of the closely divided cases in which they all sat." *Id.* at 185.

[31] Justice Douglas, now 75, wears a pacemaker. Justice Marshall is 65 and has been in poor health. Justice Brennan is 67.

stance of its Chief Justice,[32] make it difficult to disagree with the conclusion that "major expansions of procedural rights have been slowed or halted entirely" and that "as the Burger Court solidifies its sense of direction, that direction will, in all probability, run counter to much of what occurred during the Warren era."[33]

The Court's shift in attitude has made conditions ripe for an astonishing development in criminal procedure—evasion of the Supreme Court by state courts willing to protect rights of criminal defendants that are no longer guaranteed under the Federal Constitution as interpreted by the Burger Court.

Several important studies of state court evasion of the Supreme Court have been published over the past twenty years.[34] This article differs from them in two important respects. First, the type of evasion studied in the past occurred under circumstances where the federal rights of the accused were broader than his state rights, and the state courts attempted to narrow those rights. This article considers evasion which permits the accused to assert rights under state law that he might not have under federal law. Second, the means of evasion examined in earlier studies consisted principally of disobedience to or avoidance of mandates of the Supreme Court after cases had been reviewed by the Court and remanded for further proceedings. The evasion analyzed here involves no lawless defiance of the Court; rather, it is accomplished by the expedient of exploiting loopholes in the Court's power of review.

While the number of recent cases which are identifiable as evasive is quite small, the evasion cases decided since 1969 are nevertheless of tremendous importance; they are the harbingers of a new era in criminal procedure. After a decade of Warren Court activism in which federal rights assumed unheard of importance in state criminal trials, the decisions of the Burger Court indicate that henceforth the Constitution will assure only basic

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[32] Kurland, *Enter the Burger Court: The Constitutional Business of the Supreme Court, O.T. 1969*, 1970 SUP. CT. REV. 1, 1-2.

[33] Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249, 277-78 (1971).

[34] *E.g.*, Beatty, *State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court*, 6 VAL. U.L. REV. 260 (1972); Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954).

standards of protection, and all rights above this minimum level will exist, if at all, only by virtue of state law. Against the background of the Burger Court decisions, the evasion cases indicate that the nation is moving into a new period of federalism in criminal procedure in which the state-based rights of criminal defendants will assume increasing significance as federal-based rights play an ever-diminishing role.

Just how this shift can and to what extent it will occur requires first an analysis of the Supreme Court's authority to review state court decisions. This analysis is made in Part I. Thereafter, Part II will examine the evasion of the Burger Court which has occurred to date, and Part III will explore the possibilities for future evasion.

I

THE AUTHORITY OF THE SUPREME COURT TO REVIEW STATE COURT DECISIONS

The Constitution does not explicitly empower the Supreme Court to review state court decisions. It does provide that the Supreme Court shall have appellate jurisdiction under such regulations as Congress shall make.[35] Under the Judiciary Act of 1789, the Court was empowered to review state judgments,[36] and since that time the Court's authority to do so has not been open to serious question.[37]

Statutory authority for Supreme Court review of state court decisions is conferred by 28 U.S.C. § 1257 which restricts review to state judgments involving federal questions. The statute grants power to reexamine final judgments[38] rendered by the

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[35] U.S. CONST. art. III.

[36] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85-87.

[37] For an examination of the history of attacks on the Supreme Court's appellate jurisdiction over state courts, *see* Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—a History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1 (1913).

[38] The determination of whether the judgment is final is left to the Court itself. The test is increasingly a pragmatic one with a trend toward relaxing the finality requirement. Traditionally the rule has been that a judgment cannot be considered final if it leaves open something that may itself raise a federal question. *See* C. WRIGHT, LAW OF FEDERAL COURTS 483-85 (2d ed. 1970); Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932). In California v. Stewart, 384 U.S. 436 (1966), a state judgment ordering a retrial was held final under § 1257(3) since the state would have no appeal if the defendant were acquitted at his retrial.

highest court of a state in which a decision could be had in these circumstances:

> (1) By appeal, where the validity of a federal statute or treaty is drawn in question, and the decision is against its validity;
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> (2) By appeal, where the validity of a state statute is drawn in question on the ground that it violates the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity; or
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> (3) By certiorari, where the validity of a federal statute or treaty is drawn in question; where the validity of a state statute is drawn in question on the ground it violates the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is claimed under the Constitution, treaties, or laws of the United States.

Although 28 U.S.C. § 1257 on its face authorizes review of state judgments involving federal questions irrespective of the presence of questions of state law, the Court has consistently declined to review judgments of state courts resting on an adequate state ground. Under the adequate state ground rule, the Court will refuse to reexamine a state decision involving a federal question if there is a nonfederal ground sufficient to support the judgment.

The rule arose out of a provision of the Judiciary Act of 1789 which limited Supreme Court review of state decisions to federal questions.[39] Even though this restriction was removed in 1867 when the Judiciary Act of 1789 was repealed,[40] the Court in *Murdock v. City of Memphis*[41] adhered to the limitation:

> The twenty-fifth section of the act of 1789 has been the subject of innumerable decisions, some of which are to be found in almost every volume of the reports from that year down to the present. These form a system of appellate jurisprudence relating to the exercise of the appellate power of this

[39] But no other error shall be assigned or regarded ground for review in any such case as aforesaid, than such appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 86-87.

[40] Judiciary Act of 1867, ch. 28, § 2, 14 Stat. 386.

[41] 87 U.S. (20 Wall.) 590 (1875).

> court over the courts of the States. That system has been based upon the fundamental principle that this jurisdiction was limited to the correction of errors relating solely to Federal law. And though it may be argued with some plausibility that the reason of this is to be found in the restrictive clause of the act of 1789, which is omitted in the act of 1867, yet an examination of the cases will show that it rested quite as much on the conviction of this court that without that clause and on general principles the jurisdiction extended no further. It requires a very bold reach of thought, and a readiness to impute to Congress a radical and hazardous change of policy vital in its essential nature to the independence of the State courts, to believe that that body contemplated, or intended, what is claimed, by the mere omission of a clause in the substituted statute, which may well be held to have been superfluous, or nearly so, in the old one.[42]

Whether the adequate state ground rule is one of jurisdiction or of judicial administration is unclear. Early cases indicated that the rule was simply a self-imposed restriction. Accordingly, state judgments resting on adequate state grounds were affirmed.[43] Recent cases, however, take the position that the rule is jurisdictional.[44] The rationale appears to be that there is no case or controversy when issues of state law are dispositive of the case, even though the decision might also be based upon erroneously decided questions of federal law. In *Herb v. Pitcairn*[45] the Court said:

> The reason [for the rule] is so obvious that it has rarely been thought to warrant a statement. It is found in the partitioning of the power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we

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[42] *Id.* at 630.

[43] *E.g.*, Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875).

[44] *E.g.*, Dept. of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965); Jankovich v. Indiana Road Comm'n, 379 U.S. 487 (1965); Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

[45] 324 U.S. 117 (1945).

> corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.[46]

The tests for "adequacy" have been developed primarily in response to state court attempts to frustrate claims of federal rights. In most cases the state ground evaluated has been a rule of procedure that allowed the state court to refuse to decide a federal claim because it had been improperly raised.[47] In this context, whether a state procedural ground is adequate is itself a federal question,[48] and the adequacy of the state ground must be evaluated in terms of whether the state rule justified a refusal to consider the federal claim raised in the state court.

For determining whether a state ground is adequate, the Supreme Court has fashioned several standards to aid in interpreting state decisions. The Court has said that the nonfederal ground must be broad enough, without reference to the federal question, to sustain the judgment below.[49] A second standard states that "where a non-federal ground is so interwoven with the other [i.e., federal ground] as not to be an independent matter . . . our jurisdiction is plain."[50] In other words, the nonfederal ground must be independent of the federal question. In *Ivanhoe Irrigation District v. McCracken*,[51] the state ground was held inadequate to preclude Supreme Court review because it was based upon an interpretation of a federal statute. A third standard requires simply that the nonfederal ground be tenable.[52] A state ground is untenable if it is "without any fair or substantial sup-

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[46] *Id.* at 125-26.

[47] *E.g.*, Street v. New York, 394 U.S. 577 (1969); Douglas v. Alabama, 380 U.S. 415 (1965); Henry v. Mississippi, 379 U.S. 443 (1965); Wright v. Georgia, 373 U.S. 284 (1963); Staub v. City of Baxley, 313 U.S. 313 (1958); Reece v. Georgia, 350 U.S. 853 (1955); Carter v. Texas, 177 U.S. 442 (1900).

[48] Henry v. Mississippi, 379 U.S. 443, 447 (1965); Love v. Griffith, 266 U.S. 32, 33-34 (1924).

[49] Eustis v. Bolles, 150 U.S. 361, 370 (1893); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590. 636 (1875).

[50] Enterprise Irrigation Dist. v. Farmers' Mut. Canal Co., 243 U.S. 157, 164 (1917).

[51] 357 U.S. 275 (1958).

[52] One writer has isolated three considerations to assist in determining whether a state ground is tenable: (1) whether a consistent pattern of state court decisions can be found relative to the state ground at issue; (2) whether the nonfederal ground is consistent with generally accepted principles of law; (3) whether in the state court there was adequate forewarning of procedural requirements. Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 HARV. L. REV. 1375, 1382 (1961).

port."[53] In *NAACP v. Alabama ex rel. Patterson*,[54] a local procedural rule was held not to constitute an adequate state ground because the petitioner was not deemed to have been fairly apprised of its existence. In *Leathe v. Thomas*[55] the Court noted that a state ground would not be adequate where it was so palpably unfounded that it could not be presumed to have been entertained.

These three criteria—breadth, independence, and tenability—are obviously interrelated. They are also separable. For example, breadth and independence have been distinguished on the theory that a sufficiently broad state ground determines the rights of the parties, whereas independence refers to the reasoning underlying the state ground.[56] Tenability has particular reference to whether the state ground is fair and reasonable.[57]

In overview, it is clear that in a state case where no federal claim is raised by the parties the Supreme Court has no authority under 28 U.S.C. § 1257 to review the judgment because no federal question is involved. If a federal claim is raised coincident with issues of state law, the adequate state grounds doctrine must be considered if the decision rests in whole or in part on state law. (If the state court rests its decision solely on federal grounds, then Supreme Court jurisdiction to review the case is clear under 28 U.S.C. § 1257). A state judgment resting solely on state law may nevertheless be reviewable if a claimed federal right was unjustifiably denied. A state judgment resting partly on state law and partly on federal law is likewise reviewable if the federal issue is wrongly decided and the state ground is not independently adequate to support the judgment.

Important corollaries follow this brief synopsis. First, if a state court were to grant an accused a right based solely on state law that is *broader* than any right guaranteed under federal law,

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[53] Ward v. Love County, 253 U.S. 17, 22 (1920).
[54] 357 U.S. 449 (1958).
[55] 207 U.S. 93, 99 (1907).
[56] Note, *The Untenable Nonfederal Ground in the Supreme Court*, 74 HARV. L. REV. 1375, 1382 (1961).
[57] *See, e.g.*, Broad River Power Co. v. South Carolina, 281 U.S. 537, 543 (1930) (interpretation of state statute by state court did not "so depart from established principles as to be without substantial basis"); Cent. Union Tel. Co. v. City of Edwardsville, 269 U.S. 190, 195 (1925) (state construction of state statute binding on Court "unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it").

the case cannot be reviewed by the Supreme Court. This is so regardless of whether the accused claimed the right on the basis of federal law. Even though a right may be claimed under federal law, granting the claim on the basis of state law could not work a denial of the federal right, and the state ground would not raise a separate federal question of "adequacy". Second, if the state court granted the right on the basis of both state and federal law, even a mistaken interpretation of federal law would not effect the otherwise independent and adequate state ground supporting the decision.

Supreme Court review of state court judgments is therefore far from unlimited. 28 U.S.C. § 1257 precludes review of state judgments resting solely on state grounds, and a judgment does not involve a federal question simply because a state court establishes rights under state law that are more favorable to the accused than his rights under federal law. The adequate state ground rule bars reexamination of judgments resting on adequate state grounds, and while the rule was formulated to prevent circumvention of claimed federal rights, it presently encompasses situations in which a state-based right is broader than a federally based right. As shall be seen, these important limitations on Supreme Court review play a vital role in formulating a strategy for evading the Burger Court.

II

STATE COURT EVASION OF THE BURGER COURT

A. *Background*

Prior to 1914 the Supreme Court could review a state court judgment only when the state court had upheld the validity of a state statute, struck down a federal statute or treaty, or denied a claim of federal right or privilege. As a result the Supreme Court could not review state judgments sustaining federal claims. This restriction on the Court's power of review originated in the Judiciary Act of 1789,[58] and the reason for the limitation has been explained as follows:

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[58] *And be it further enacted,* That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the

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> The jurisdiction conferred upon the Supreme Court by the Judiciary Act was wide enough to restrain local jealousies and to preserve the newly created central authority from encroachment by the states. No more was necessary. If a state court in that day and generation sustained a federal right, it would be practically certain to prevail in the Supreme Court also. The denial of an appeal in such cases was a wise measure to prevent fruitless litigation.[59]

However, in response to state court decisions that struck down humanitarian legislation as violative of the Federal Constitution, a statute was passed in 1914 which vested the Supreme Court with authority to review state decisions upholding claims of federal rights.[60] The immediate impetus for enacting the statute was an unpopular New York decision invalidating a workman's compensation act on the ground that it was repugnant to both the federal and state constitutions.[61]

The first state judgment in a criminal case that was set aside for overextending the rights of an accused was *California v.*

(Footnote continued from preceding page)

> validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemptions specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States . . .

Judiciary Act of 1789, ch. 20 § 25, 1 Stat. 85-86.

[59] Note, *Wider Jurisdiction for the United States Supreme Court,* 28 HARV. L. REV. 408 (1915).

[60] It shall be competent for the Supreme Court to require, by certiorari or otherwise. . . . although the decision in such case may have been in favor of the validity of the treaty or statute or authority exercised under the United States or may have been against the validity of the State statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States, or in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States.

Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

Decisions on the law prior to 1914 are collected at 28 U.S.C.A. § 1257 n.1 (1966). The cases illustrate the requirement that the state judgment be adverse to a federal claim before Supreme Court jurisdiction can be invoked.

[61] Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 94 N.E. 431 (1911). It has been noted that the decision would not have been reviewable even after passage of the 1914 act because of the adequate state ground rule. *See* C. WRIGHT, LAW OF FEDERAL COURTS 482 (2d ed. 1970).

For an influential article which helped bring about passage of the 1914 statute, *see* Dodd, *The United States Supreme Court as the Final Interpreter of the Federal Constitution,* 6 ILL. L. REV. 289 (1911).

Green,[62] decided precisely one year after Chief Justice Burger took office. In *Green*, the California Supreme Court had held that a statutory provision permitting use of prior inconsistent statements as substantive evidence violated the confrontation clause of the sixth amendment.[63] On certiorari, the judgment was vacated by the Burger Court, which held that substantive use of such statements was not forbidden by the Constitution where the declarant is testifying as a witness and is subject to full cross-examination.

The California Supreme Court was again held to have adjudged an accused's rights too generously in *California v. Byers*.[64] The defendant had been charged with violating a criminal statute which required drivers of automobiles involved in an accident to stop and furnish information. The California Supreme Court granted a writ of prohibition to restrain the preceedings on the grounds that the statute infringed upon the defendant's privilege against self-incrimination under the fifth amendment.[65] The Burger Court, on certiorari, vacated and remanded, holding that the statute did not violate respondent's rights under the fifth amendment.

More recently, in *Michigan v. Payne*,[66] the Court reversed the Michigan Supreme Court and held that *North Carolina v. Pearce*[67] was not to be given retroactive application.[68]

The importance of these decisions can scarcely be overestimated. They present the anomalous spectacle of the highest federal court taking a dimmer view of federal rights than state courts, and they show that the Burger Court will not hesitate to set aside state judgments that expand federal rights beyond the

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[62] 399 U.S. 149 (1970).
[63] People v. Green, 451 P.2d 422, 75 Cal. Rptr. 782 (1969).
[64] 402 U.S. 424 (1971).
[65] Byers v. Justice Court, 458 P.2d 465, 80 Cal. Rptr. 595 (1969).
[66] 412 U.S. 47 (1973).
[67] 395 U.S. 711 (1969). In *Pearce* it was held that the double jeopardy clause made applicable to the states by *Benton v. Maryland*, 395 U.S. 784 (1969) prohibited the imposition after retrial of a more severe sentence unless the record affirmatively showed objective information concerning behavior by the defendant after the original sentencing which would justify the harsher sentence.
[68] In Michigan v. Bloss, 413 U.S. 909 (1973), the Burger Court vacated the judgment of the Michigan Supreme Court and remanded the case for further consideration in light of Miller v. California, 413 U.S. 15 (1973) and the Court's other decisions of June 25, 1973 revivifying criminal obscenity statutes. The Michigan court had reversed respondent's conviction for violating a state obscenity statute on the ground that the allegedly obscene materials were protected by the first amendment. *See* People v. Bloss, 201 N.W.2d 806 (Mich. 1972).

limits thought desirable by the Burger Court. If rights broader than the Burger Court definitions are to be given to criminal defendants, then more liberally oriented state courts must act evasively.

B. *The Strategy of Evasion*

A state court anxious to evade the Supreme Court will have to be concerned with the Court's certiorari jurisdiction under 28 U.S.C. § 1257(3).[69] Therefore a state court must first determine whether its judgment, if not evasive, will be subject to review under the provisions of § 1257(3). If the judgment is reviewable, then an evasive state court must frame the judgment in such a way that § 1257(3) is avoided.

There are several possible techniques for avoiding Supreme Court jurisdiction under § 1257(3). A state court might take advantage of the constitutional limitation of Supreme Court jurisdiction to cases or controversies and attempt evasion through non-reviewable advisory opinions construing a federal right more broadly than the Supreme Court, if such opinions are authorized under state law. For a simple reason, however, this technique is not a practicable method of evasion. Even though the advisory opinion itself might not be subject to review, subsequent applications of the opinion to cases or controversies would be reviewable.

Alternatively, a state court might refuse to inject a federal question into a case in which issues of state law alone had been raised, since neither constitutional nor statutory provisions permit the Supreme Court to review decisions not involving a federal question. Thus, in a case in which no federal claim is raised, a state court may avoid review by deliberately declining to reach a federal question *sua sponte* and instead holding that rights under state law are at least as comprehensive as those under federal law. This technique is limited, however, to cases in which a

[69] It seems doubtful that the Supreme Court would narrow the rights of the accused in a case on appeal under § 1257(1) because this subsection requires that the judgment be against the validity of a federal treaty or statute, and such a judgment would not be in favor of the rights of an accused except in the unlikely event that the treaty or statute invalidated confers broader rights than the Constitution. It is even more doubtful that a judgment appealed under § 1257(2) would be set aside for having given too broad an interpretation to a federal right. § 1257(2) requires that a state statute be held not repugnant to the Constitution. To be invalid, a statute would have to abridge a federal right.

federal claim has not been raised (an unlikely occurrence, since defendants tend to raise every claim possible), and courts have no control over which claims are raised by an accused.

As the analysis in Part I suggests,[70] a far more promising method of evasion exists. It consists of using the adequate state grounds doctrine and is accomplished by grounding a decision on a construction of the accused's rights under state law which is at least as favorable as the rights given by federal law. Under the tests for "adequacy" previously noted—breadth, independence and tenability—such an approach would clearly serve to insulate the decision from Supreme Court review. Furthermore, this approach avoids the problems encountered under the advisory opinion technique, and it places state courts in control of the critical issues decided in any given case.

State courts have precluded review by the method of holding in favor of an accused's rights on the basis of state law before the advent of the Burger Court.[71] And on numerous occasions state courts have iterated that they may grant broader rights under state law than the Supreme Court may be willing to grant under federal law.[72] Nevertheless, it is only since the advent of the Burger Court that state courts have made systematic use of the adequate state ground rule for evasion purposes.

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[70] See text at notes 57-58 *supra*.

[71] For example, in People v. Barber, 46 N.E.2d 329 (1943), a Jehovah's Witness had been convicted of violating a town licensing ordinance after he had offered religious books for sale. The year before, in Jones v. Opelika, 316 U.S. 584 (1942), the Supreme Court had held that a similar Alabama city ordinance which had been interpreted by the Alabama state courts to apply to the sale of religious books by Jehovah's Witnesses was not inconsistent with the Constitution. The court in *Barber*, after gratuitiously pointing out "that in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States," *Barber* at 331, reversed the conviction by holding that the ordinance could not be construed to cover solicitation by members of religious societies for the purpose of paying the costs of the religious body's solicitations or of raising funds to support the society.

Indeed, some state courts have even gone beyond the Warren Court's holdings. *See* State v. Browder, 486 P.2d 925 (Alaska 1971); Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970); Roberts v. State, 458 P.2d 340 (Alaska 1969); State v. Brown, 497 P.2d 1191 (Ore. 1972).

[72] *E.g.*, Lanied v. State, 486 P.2d 981 (Alaska 1971); State *ex rel.* Juhan v. District Court, 439 P.2d 741 (Colo. 1968); Curry v. Supreme Court, 470 P.2d 345, 87 Cal. Rptr. 361 (1970); State *ex rel.* Juhan v. District Court, 439 P.2d 741 (Colo. 1968); Creamer v. State, 192 S.E.2d 350 (Ga. 1972); State v. Eexeira, 433 P.2d 593 (Hawaii 1967); State v. Chandler, 236 A.2d 632 (N.J. 1967).

C. *The Pattern of Evasion of the Burger Court*

By no means all or even a majority of state high courts disagree with the Burger Court's approach toward the rights of criminal suspects. Many state courts decried decisions of the Warren Court,[73] and it seems reasonable to believe that these courts are not dissatisfied with what the Burger Court is doing. But a few state courts, especially those in California and Hawaii, seem determined to evade the Burger Court's retrenchment. Moreover, these courts seem to be fully aware of the use of the adequate state ground as the proper strategy of evasion. Although only a handful of evasive decisions have been located, they show clearly that some state courts, anxious to protect the rights of the accused and yet avoid review by the Burger Court, have used the rule to preclude the possibility of such review.

Not every decision vindicating an accused's rights under federal and state law or under state law alone is evasive. Although a number of decisions have been handed down over the past few years upholding claims of state or of federal and state rights, it cannot be said that they were all evasive.[74] For purposes of this article, an evasive case is one in which it is apparent from the opinion or the circumstances under which it was delivered that the state court intended to use the adequate state ground rule to avoid Supreme Court review. The evasion cases may be grouped into categories: cases in which the evasion was acomplished by resting the decision on nonfederal grounds alone, and cases in which the evasion was accomplished by resting the decision on both federal and nonfederal grounds. In all but one of the cases the state ground was founded on a state constitution; in the one case, the state ground was statutory.

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[73] For example, in Leonard v. State, 453 P.2d 257, 259 (Okla. Cr. App. 1969), the court bitterly assailed the Warren Court decision in Spinelli v. United States, 393 U.S. 410 (1969), which established stringent probable cause requirements for search warrants. The court said that the decision in *Spinelli* was "rendered by a divided court whose dissenting minority speaks with greater clarity and logic, based on experience, than does the technical gymnastics of the majority. . . . we must forge yet another link in the federal handcuffs placed upon state courts and law enforcement officials." *See also* State v. Lettle Art. Co., 204 N.W.2d 574 (Neb. 1973).

[74] *E.g.*, Glasgow v. State, 469 P.2d 682 (Alaska 1970); *In re* Lynch, 503 P.2d 921, 105 Cal. Rptr. 217 (1972); People v. McCabe, 275 N.E.2d 407 (Ill. 1971); People v. Lorentzen, 194 N.W.2d 827 (Mich. 1972); State v. Matteson, 205 N.W.2d 512 (S.D. 1972).

1. STATE GROUNDS ALONE

The defendant in *People v. Anderson*[75] claimed that capital punishment violated both the federal and the state constitutions. The California Supreme Court held in favor of the defendant with respect to the issue of state law and found it unnecessary to resolve the federal question. The wording and circumstances of the decision make plain that it was evasive. *Anderson* was decided at a time when, as the California court knew,[76] several cases raising the identical federal question were pending in the Supreme Court.[77] There can be little doubt that the decision in *Anderson* was handed down to protect the rights of those sentenced to death in California in the event that the Burger Court should uphold the death penalty.[78]

The California attorney general certainly believed the decision was evasive. After his petition for rehearing was denied, he filed a petition for certiorari in the Supreme Court. Invoking the jurisdiction of the Court under § 1257(3),[79] he asserted that the California court had acted "with the obvious purpose of avoiding that court's recent experience with the Court's review of California constitutional provisions and statutes on federal constitutional grounds"[80] and then cited *Green* and *Byers*. Asking the Court to "disregard the California Supreme Court's effort to disguise its decision for the purpose of avoiding this Court's review," he claimed:

> The question squarely presented by the Petition is whether the highest court of a State may defeat the jurisdiction of this Court to review vital federal constitutional issues by purporting to decide the issue on the basis of an identical provision in the state constitution.[81]

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[75] 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

[76] *Id.* at 883 n.1, 100 Cal. Rptr. at 155 n.1 (1972).

[77] The cases were: Aikens v. California, *cert. granted*, 403 U.S. 952 (1971); Furman v. Georgia, *cert. granted*, 403 U.S. 952 (1971); Jackson v. Georgia, *cert. granted*, 403 U.S. 952 (1971); Branch v. Texas, *cert. granted*, 403 U.S. 952 (1971).

[78] The court noted that it faced "a question which cannot be avoided by deferring to any other *court* or to any other branch of government." 493 P.2d at 887, 100 Cal. Rptr. at 159 (1972) (emphasis added). Other commentators have concluded that *Anderson* was evasive. *See* Barrett, *Anderson and the Judicial Function*, 45 So. CAL. L. REV. 739 (1972); Bice, *Anderson and the Adequate State Ground*, 45 So. CAL. L. REV. 750 (1972).

[79] Petitioner's Brief for Certiorari at 3, California v. Anderson, 406 U.S. 958 (1972).

[80] *Id.* at 11.

[81] *Id.* at 11.

The petition was denied.[82]

In *Anderson* the state court was attempting to deal with the possibility that the Burger Court might in several pending cases rule against the accused with respect to the same federal question raised in the state court. In the other four cases in which evasion was attempted, the state court was concerned with the possibility of avoiding a past decision of the Burger Court.

In *State v. Santiago*,[83] the defendant claimed that statements obtained in violation of *Miranda v. Arizona*[84] had been used at his trial. The prosecution contended that the statements were properly introduced for the purpose of impeaching the defendant's credibility. In *Harris v. New York*,[85] decided ten months earlier, the Burger Court had held that statements inadmissible under *Miranda* as part of the prosecution's case in chief might nevertheless be admitted for impeachment purposes. Acknowledging that it must yield to Supreme Court interpretations of the Federal Constitution, the Hawaii Supreme Court took up the question whether use of the statements, although permitted by the Federal Constitution, was impermissible under the state constitutional provision barring self-incrimination:

> [T]his court is the final arbiter of the meaning of the provisions of the Hawaii Constitution. Nothing prevents our constitutional drafters from fashioning greater protections for criminal defendants than those given by the United States Constitution. [Citation omitted.][86]

The court then held that the *Miranda* rules were required by the state constitution and that the state constitution made statements inadmissible under the *Miranda* rules inadmissible for any purpose, including impeachment.[87]

At issue in *State v. Collins*[88] was the extent of the prosecution's burden of establishing the admissibility of a confession alleged

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[82] California v. Anderson, 406 U.S. 958 (1972). Thereafter the Court dismissed the writ of certiorari in *Aikens* because petitioner no longer faced a realistic prospect of execution due to *Anderson*. In its order the Court noted that *Anderson* rested "on an adequate state ground." Aikens v. California, 406 U.S. 813, 814 (1972).

[83] 492 P.2d 657 (Hawaii 1971).

[84] 384 U.S. 436 (1966).

[85] 401 U.S. 222 (1971).

[86] 492 P.2d 657, 664 (Hawaii 1971).

[87] *Id.* at 664-65.

[88] 297 A.2d 620 (Me. 1972).

to have been obtained illegally. In *Lego v. Twomey,*[89] the Burger Court, less than a year before, had decided that the Constitution requires proof by a preponderance of the evidence. The Maine Supreme Judicial Court, basing its decision on public policy and the privilege against self-incrimination, held that confessions alleged to be inadmissible could not be admitted in a Maine state court unless their admissibility was established beyond a reasonable doubt.[90]

In *State v. Granberry,*[91] the Missouri Supreme Court faced the question which the Burger Court faced in *Green*: may prior inconsistent statements made by a witness be used as substantive evidence in a criminal case? In *Green,* the Burger Court had found no federal constitutional impediment to such a practice. The Missouri Court found the practice to be impermissible, apparently on the ground that the Missouri Constitution permitted the substantive use of prior inconsistent statements only when made in the form of sworn, written depositions.[92]

In *State ex rel. Arnold v. County Court of Rock County,*[93] the defendant contended that recordings of conversations to which he had been a party were inadmissible under the fourth amendment. The conversations had been surreptitiously monitored and recorded by a police officer without defendant's knowledge and without court approval but with the consent of the other party to the conversation. The Wisconsin Supreme Court found that under *United States v. White,*[94] decided by the Burger Court two months previously, no violation of the fourth amendment had occurred. Nevertheless, the court held that although the defendant's "expectation of privacy may not have [had] a constitutional basis under *White,*"[95] the evidence was inadmissible under the Wisconsin Electronic Surveillance Control Law, at least as

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[89] 404 U.S. 477 (1972).

[90] State v. Collins, 297 A.2d 620, 627 (Me. 1972). The conviction was nevertheless affirmed because the court found that the admissibility of the confessions was established beyond a reasonable doubt.

[91] 491 S.W.2d 528 (Mo. 1973).

[92] *Id.* at 531. The court held that depositions were admissible as substantive evidence under case law, Pulitzer v. Chapman, 85 S.W.2d 400 (Mo. 1935) and under a 1945 amendment to the state constitution, MO. CONST. art. 1 § 18(b). Otherwise prior inconsistent statements were inadmissible.

[93] 187 N.W.2d 354 (Wis. 1971).

[94] 401 U.S. 745 (1971).

[95] State *ex rel.* Arnold v. County Court of Rock County, 187 N.W.2d 354, 357 (Wis. 1971).

part of the prosecution's case in chief.[96] Thus the court held that a state statute provided a suspect with a right that was denied him under the Federal Constitution as construed by the Burger Court.[97]

2. FEDERAL AND NONFEDERAL GROUNDS

In *State v. Barquet*,[98] the defendants claimed that two criminal abortion statutes violated the fourteenth amendment because they were vague and invaded the female's right to privacy. With respect to the vagueness issue, the Florida Supreme Court noted that it was "well aware of the pendency of various appeals before the United States Supreme Court concerning the identical question." Yet the court stated that "[a]lthough similar statutes may be held valid by the United States Supreme Court, it does not necessarily follow that they are valid under the state constitution."[99] The court then held that the statutes violated both the due process clause of the fourteenth amendment and the similar provision in the state constitution.[100] Apparently recognizing that its actions would insulate the decision from review, the court said that "[t]he outcome on the appeals presently pending before the United States Supreme Court will not affect our decision in this case that the statutes are violative of our State Constitution."[101]

People v. Barksdale[102] is a similar case. There, less than two months before the landmark opinions in *Roe v. Wade*[103] and *Doe v. Bolton*,[104] the California Supreme Court, on grounds of vagueness, held various provisions of the California Therapeutic Abor-

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[96] *Id.* at 357-59.

[97] The court believed that the law's carefully drawn provisions regarding prior court approval of electronic surveillance would be defeated if evidence obtained without court approval and on the basis of consent of only one party to a conversation were to become admissible. The court therefore reasoned that the statute declaring interception with the consent of one party "not unlawful," W.S.A. § 968.31(2)(b), permitted such evidence to be used for investigative purposes but not as evidence in court as part of the prosecution's case in chief. Apparently the court left open the possibility that evidence so obtained could be used to impeach the credibility of the defendant. *See id.* at 363 (dissenting opinion of Hauser, J.).

[98] 262 So. 2d 431 (Fla. 1972).

[99] *Id.* at 435. Presumably the cases pending in the Supreme Court to which the court was referring were Roe v. Wade, *prob. juris. postponed*, 402 U.S. 941 (1971) and Doe v. Bolton, *prob. juris. postponed*, 402 U.S. 941 (1971).

[100] *Id.* at 438.

[101] *Id.* at 436.

[102] 503 P.2d 257, 105 Cal. Rptr. 1 (1972).

[103] 410 U.S. 113 (1973).

[104] 410 U.S. 179 (1973).

tion Act violative of the due process clauses of both the federal and state constitutions.

In *People v. Krivda*,[105] the California court held illegal a warrantless search of defendant's trash receptacle, citing an earlier case[106] holding a search illegal under both the fourth amendment and the state constitutional provision dealing with unreasonable search and seizure. The state attorney general then filed a petition for certiorari under § 1257(3). After oral argument, the Supreme Court vacated the judgment and remanded the case to the court below, stating that it could not determine whether the judgment rested on the fourth amendment, the equivalent state constitutional provision, or both, and therefore was "unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground."[107]

On remand, the California court entered a second opinion:

> Pursuant to the mandate . . . we have reexamined our opinion in the subject case . . . and certify that we relied upon both the Fourth Amendment to the United States Constitution and article I, section 19, of the California Constitution, and that accordingly the latter provision furnished an independent ground to support the result we reached in that opinion. Inasmuch as we deem it unnecessary to alter or amend our prior decision, we reiterate that decision in its entirety.[108]

The state promptly filed a second petition for certiorari under the provisions of § 1257(3). Arguing that the Supreme Court was not bound by the California Supreme Court's observation that the California Constitution furnished an independent ground for its opinion, the state attorney general asked the Court to establish new standards prohibiting state courts from utilizing the adequate state ground rule to insulate from review decisions in favor of the rights of criminal suspects:

> The importance of this question of Supreme Court jurisdiction should be readily apparent to the members of this Court. It involves the extent to which a State supreme court

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[105] 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).
[106] People v. Edwards, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).
[107] California v. Krivda, 409 U.S. 33, 35 (1972).
[108] People v. Krivda, 504 P.2d 457, 105 Cal. Rptr. 521 (1973).

> can insulate its decision of a federal question from review by this Court. State substantive law has received comparatively little attention in the development of this Court's tests of adequacy because it usually will not serve the purpose of discriminating against the enforcement of federal rights . . . Since the presence of an adequate state law ground will immunize a State supreme court's decision of a federal question from review by this Court, it is important that this Court fashion a test which delineates what is adequate in the substantive law context.[109]

The petition was denied.[110]

The defendant's conviction for oral copulation was reversed in *People v. Triggs*[111] because the policeman's clandestine rest room observation was held to violate the defendant's reasonable expectation of privacy. In a telling footnote, the court showed that it was cognizant of the fact that a decision vindicating a defendant's rights under state law is immune from Supreme Court review:

> Most search and seizure cases decided by California courts refer both to federal law and to state law. Since many of the cases cited as setting forth "state law" make express reference only to the Fourth Amendment, and neglect mention of the parallel provisions of the California Constitution (art. I, § 19), it is often difficult to determine whether a case was disposed of on the basis of state or federal constitutional law. The issue is, of course, crucial to federal review of our decisions.[112]

Then, after noting that it retained power to impose higher standards on search and seizure than is required under federal law, the court made plain that its decision was based on a vindication of both federal and state rights:

> Although for the sake of convenience we often refer to constitutional guarantees, both state and federal, against unreasonable searches and seizures under the rubric of 'Fourth Amendment' rights, our decision today is based both upon

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[109] Petitioner's Brief for Certiorari at 7, 10-11, California v. Krivda, 412 U.S. 919 (1973).
[110] California v. Krivda, 412 U.S. 919 (1973).
[111] 506 P.2d 232, 106 Cal. Rptr. 408 (1973).
[112] *Id.* at 237 n.5, 106 Cal. Rptr. 408, n.5 (1973).

> our reading of applicable federal Fourth Amendment law and our own determination of the proper construction of article I, section 19, of the California Constitution.[113]

D. *Response of the Burger Court*

The Burger Court's refusal to grant certiorari in *Anderson* and *Krivda* indicates that the Court is not prepared at this time to modify its interpretation of the adequate state ground rule, even when the rule is clearly being used to evade the Court's appellate jurisdiction. In two other cases the Court has manifested a lack of inclination to modify the adequate state ground rule.

In *Kaplan v. Superior Court*,[114] the California Supreme Court held that a statutory provision[115] had not repealed California's so-called "vicarious exclusionary rule," by which a defendant is permitted to invoke the exclusionary rule even though the immediate victim of the illegal search and seizure is a third person and the defendant is aggrieved by the search and seizure only in the sense that evidence obtained thereby is to be used against him.[116] The rule was reaffirmed on the ground that it was based on the constitutional principles of *Mapp* and *People v. Cahan*[117] and was, therefore, exempt from the operation of the statute. The decision was then appealed to the Supreme Court under § 1257(2) on the theory that the state court had found a state statute not to be repugnant to the Constitution. The state attorney general contended that the supremacy clause of the Federal Constitution was violated when the California court upheld a rule of standing broader than the one applicable under the fourth amendment.[118] The appeal was dismissed because the judgment rested on an adequate state ground.[119]

In *Commonwealth v. Ware*,[120] the Pennsylvania Supreme

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[113] *Id.*

[114] 491 P.2d 1, 98 Cal. Rptr. 649 (1971).

[115] CAL. EVID. CODE § 351.

[116] As noted in *Kaplan*, the "vicaricus exclusionary rule" is not, strictly speaking an exclusionary rule but a rule of standing. 491 P.2d 1, 7 n.8, 98 Cal. Rptr. 649, 655 n.8 (1971). The rule originated in People v. Martin, 290 P.2d 855 (Cal. 1955).

[117] 282 P.2d 905 (Cal. 1955). In *Cahan* the court held that evidence obtained illegally would be inadmissible in California state courts.

[118] Appellant's Jurisdictional Statement at 4, California v. Kaplan, 407 U.S. 917 (1972).

[119] California v. Kaplan, 407 U.S. 917 (1972).

[120] 284 A.2d 700 (Pa. 1971).

Court, following *Johnson v. New Jersey*,[121] held that the *Miranda* standards applied to a confession obtained prior to June 13, 1966, the date *Miranda* was decided, where the trial had taken place after June 13, 1966. While the Pennsylvania court stated that in so holding it was "faithfully honor[ing] the United States Supreme Court's clear directive" in *Johnson*, the court also stated that it was applying *Miranda* to all trials beginning after June 13, 1966 "as a matter of state law."[122] Thereafter a petition for certiorari was filed under § 1257(3) asking the Burger Court to overrule *Johnson* and to hold that *Miranda* did not apply to confessions taken before that date. The petition was granted.[123] The Court then requested that the prosecution reply to the contention that the decision below rested on an adequate state ground, and it was argued that the state ground was not independent because it was "so interwoven with the federal constitutional ground that this Court is entitled to retain jurisdiction."[124] On that issue, the Supreme Court vacated its prior order and denied certiorari because the judgment rested on an adequate state ground.[125]

III

THE PROSPECTS FOR CONTINUED EVASION

The use of the adequate state grounds doctrine to evade Supreme Court review has not gone uncriticized. One writer has suggested that the effect of an evasive judgment based on both federal and state grounds will be to illegitimately insulate the judgment not only from the Supreme Court but also from "effective political review" because it will "increase the state court's decision-making power vis-a-vis other branches of state government."[126] He argues:

> Decisions based on independent state and federal grounds may substantially discourage any effort to use the state political process to change the relevant state law, because amendment to the state consitution or laws cannot correct the federal

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[121] 384 U.S. 719 (1966).
[122] 284 A.2d 700, at 702 (Pa. 1971).
[123] Pennsylvania v. Ware, 405 U.S. 987 (1972).
[124] Brief for Petitioner at 14, Pennsylvania v. Ware, 405 U.S. 987 (1972).
[125] Pennsylvania v. Ware, 406 U.S. 910 (1972).
[126] Bice, *Anderson and the Adequate State Ground*, 45 SO. CAL. L. REV. 750, 757 (1972).

> defect and therefore cannot change the result of the state court's decision. Of course, the citizens or the legislature may proceed with an amendment to the state laws with the notion that another court test involving only the federal question can be instituted once the state law is changed. But it would seem to require a very high degree of organization and commitment to achieve political reform in such circumstances; rather than changing the effect of the state court decision, all reform of state law will accomplish is a "clear deck" upon which a new law suit may be brought. The presence of the federal ground will therefore produce an insulation from the political process beyond that which a state court would otherwise enjoy when it interprets the provision of state law in a fashion unsatisfactory to a substantial portion of the state's citizens. Thus the present operation of the adequate state ground doctrine allows a state court, which may not be motivated by any considerations of efficiency, to insulate its decision from effective review by either the judicial or political processes for what may be a significant period.[127]

Perhaps this fear is misplaced. If a state court decision is based on federal and state law, changes in the state constitution or statutes can overturn the state law aspects of the decision, and subsequent decisions by the Supreme Court can undermine the questions of federal law. *Anderson* is illustrative. On February 18, 1972 the California Supreme Court struck down the death penalty in California as violative of the state constitution. Shortly thereafter a campaign to overturn the decision began. On June 29, 1972 the Supreme Court handed down its decision in *Furman.* After June 29, 1972, therefore, it was clear that both the federal and state constitutions prohibited capital punishment in California. Nevertheless, on November 7, 1972, the electorate of the state of California overwhelmingly overturned *Anderson* by amendment[128] to the state constitution. California voters were not deterred from overturning a state decision even though a decision of the Supreme Court bolstered *Anderson.*

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[127] *Id.*

[128] CAL. CONST. art. 1, § 27 (1972). Following the adoption of the amendment, the California Supreme Court, on the basis of the ex post facto law provisions of both the Constitution and the state constitution, as well as *Furman,* held that the death penalty could not be inflicted in cases arising before the effective date of the amendment. *See* People v. Murphy, 502 P.2d 594, 596 n.2, 105 Cal. Rptr. 138, 140 n.2 (1973).

There may be reason to believe that evasive actions by state courts will deprive the Supreme Court of opportunities to decide important questions concerning the extent of the federal rights of the accused. There can be no doubt that at least one of the evasive cases deprived the Supreme Court of the chance to decide an important constitutional question. In *Krivda* a full scale attack on the exclusionary rule has been launched, and when the Court vacated the judgment and then denied certiorari, it lost the chance to overrule *Mapp*.[129] And in *Ware* the adequate state ground rule kept the Court from reconsidering the validity of *Miranda*.[130] Yet it would be unrealistic to think that evasive cases would materially limit the Court's opportunities to decide important questions of federal law. For one thing, the number of state courts acting evasively will probably always be small. Second, such questions can always be decided by review of lower federal court decisions.

In the course of his unsuccessful efforts to persuade the Court to end evasion by the California Supreme Court, the California attorney general suggested a novel theory to justify curbing evasion. In the petition for certiorari in *Anderson*, the attorney general argued that the evasive judgment below deprived the people of certain federally protected rights. Submitting that the republican form of government clause in the Constitution and the equal protection and due process clauses of the fourteenth amendment guaranteed "the fundamental right of the people to have their duly elected representatives empowered to enact and execute laws, for the protection of citizens' life, liberty, and property,"[131] he argued that this right was violated when, "over the will of a protesting public", the California court usurped the function of the state legislature and invalidated the death penalty:

> What more basic right do the people of a State have, than to be able to provide through their elected representatives for the protection of society against dangerous criminals? This basic power to prescribe appropriate punishment for crime

[129] Numerous amicus briefs were filed in *Krivda* by state attorneys general asking that the Court reconsider *Mapp*.

[130] One of the questions presented to the Court by petitioner in *Ware* was this: should *Miranda* be overruled?

[131] Petitioner's Brief for Certiorari at 3, California v. Anderson, 406 U.S. 958 (1972).

> exclusive of punishment involving unnecessary cruelty such as torture, as defined by this Court's decisions, lies at the heart of the police power reserved to the people of the States.[132]

The thrust of the argument appears to be that the Constitution guarantees the people of a state, through their elected representatives, the right to protect themselves against criminals, and that a federal question is raised when a state court denies that right against the popular will.

The novelty of this argument cloaks much of its speciousness. The fourteenth amendment furnishes rights to individuals, and insofar as the "public" has rights, those rights are held individually and not collectively. The fourteenth amendment does not guarantee the people of a state the right to have their legislature enact statutes suppressing crime. It is a limitation on the power of the state, not an enlargement of the rights of the people as a whole to use law to punish criminals. Moreover, the republic form of government clause does not authorize the Supreme Court to intervene in state affairs simply because it is claimed that a judgment of the state court invades the province of the state legislature. Properly viewed, a claim by one branch of state government that another branch has usurped its rightful powers is a political question beyond the ken of the Supreme Court.

The California attorney general has also argued that evasion must be curbed because it is unfair to allow the defendant to appeal a conviction under a claim that federal rights have been violated while not allowing the prosecution to appeal an evasively framed judgment in favor of the defendant's rights.[133] While this argument seems reasonable at first blush, it suffers from the same infirmity as the "republican form of government" argument: the Constitution does not give the public, nor the prosecution as the representative of the public, any "rights" in a criminal trial. Within the confines of certain federal constitutional limitations,

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[132] *Id.* at 17-18.

[133] If article I, section 19 of the California Constitution is adequate nonfederal ground supporting the search and seizure decisions of the California Supreme Court, the People of the State of California will be permanently denied access to this forum on its own petition in a search and seizure case. Only criminal defendants alleging the denial of minimum due process will have access if the California Supreme Court's citation to article I, section 19 is deemed adequate to support its judgment in this case.
Id. at 11.

the powers of the prosecution are completely determined by state law. Since the prosecution has no federal rights that the Supreme Court could protect by review, it is not unfair to deny the prosecution an appeal when a state court limits prosecutorial powers.

While it is submitted that the arguments against evasive tactics are basically unfounded, it would be myopic to conclude that the arguments will go unheard. The Burger Court is an activist court. It asserts its power as aggressively as did the Warren Court; it simply has different goals in mind.[134] Quite possibly, therefore, the Court will discontinue watching supinely while its authority is avoided by state courts holding in favor of the rights of criminal suspects. On the other hand, it is not possible to shut off all such evasion unless a constitutional amendment were adopted authorizing the Court to review all state judgments, irrespective of whether they contained a federal question, and to review all questions of law presented in state judgments. The adoption of such an amendment is quite improbable, both because it would place an impossible burden on an overworked Court and because it would destroy this nation's dual judiciary system.

There are several steps that the Burger Court itself could take to curb evasive actions by state courts. The Court could overrule *Murdock* insofar as it held that repeal of the Judiciary Act of 1789 did not grant power to review all issues in a case in which a federal claim was presented.[135] Such an action would abrogate the adequate state ground rule, thus allowing the Court to review all issues, both federal and state, in cases involving a federal question. It is unlikely, however, that the Court will take this step. It would increase the Court's work, and, by permitting the Court to rule on issues of state law, it would call for the Court to decide the type of question it has always refrained from deciding. Furthermore, it would intrude upon the healthy federalism necessary to this nation's dual judiciary system.

The Court might redefine rather than eliminate the adequate

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[134] Dershowitz and Ely, *Harris v. New York, Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1227 (1971).

[135] This step could also be accomplished by a congressional enactment amending § 1257 to specifically provide that the Court may review all questions of law in any case involving a federal question, even if the judgment is also supported by an adequate state ground.

state ground rule. This step seems to be the one the Court will take if it acts to curb the evasion. The redefinition could take several different forms. The Court could adopt the position that the rule is not jurisdictional, thus establishing its power to review state judgments even though supported by an adequate non-federal ground. Then in a case involving a federal question, the Court could exercise its power of review and affirm the judgment if the federal question had been decided correctly. If the federal question had been decided erroneously, the Court could correct the federal question and vacate, but not reverse, the judgment, leaving the state court free on remand to reinstate its prior judgment, but only on state grounds. While this alternative would permit the Court to review state judgments supported by adequate state grounds, it in fact calls for the rendering of advisory opinions, as suggested in *Herb v. Pitcairn.* Under 28 U.S. C. § 1257, the Court has authority to review *judgments* involving federal questions; the Court has no authority to review *opinions*—that is, the reasons given below for the decision. If the judgment below cannot be reversed because it is supported by adequate state grounds, the Court in reviewing such a judgment is reviewing not the judgment itself, but rather the reasons for the judgment. The reasoning of *Herb v. Pitcairn*—that the rule is jurisdictional—would thus seem to be eminently correct, and the Court would be unwise to decide otherwise.

Under a different approach, the Court could modify the adequate state ground rule with a new definition of independence. The Court could take the position that similar provisions of federal and state law must be construed similarly. Thus, when a state court construes a provision of state law as conferring a right broader than a similar provision of federal law, the Court could find that the state ground was inadequate to support the judgment because it was not independent. Thus every state decision interpreting a state constitutional provision or statute that is similar to provisions of federal law would itself raise a federal question. This step would be a radical one since hitherto the state courts have been free to construe provisions of state law as they wished, subject to the requirement that they not deny a federal right.

Finally, the Court could modify the rule by relaxing it in cases in which a state court resting its judgment on state grounds

was found to be motivated by an "illegitimate" desire to evade the Court.[136] There are serious drawbacks to such an approach. Judgments as to motivation are difficult and time-consuming. Furthermore, such an approach would intrude upon the healthy aspects of federalism, for federalism implies that state courts may disagree with the Supreme Court as long as they do not interfere with the federal rights of persons accused of crime.

CONCLUSION

During the Warren era commentators on occasion attacked the Supreme Court on the ground that the Court was transforming the Bill of Rights into a nationwide code of criminal procedure,[137] with the result that the states were no longer free to experiment or innovate in the area of criminal justice. After four full terms of the Burger Court, there is no longer a realistic basis for these claims. Indeed, just the opposite appears to be occurring. By lowering the level of constitutional protections the Burger Court has invited the states to adopt standards higher than those of federal law. As a result, it is to be expected that the tendency of state courts to evade the Burger Court by basing rulings in favor of the rights of the accused on grounds of state law will increase. Undoubtedly other forms of evasion will occur also.[138]

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[136] This suggestion was made and rejected in Bice, *Anderson and the Adequate State Ground*, 45 So. CAL. L. REV. 750, 759-60 (1972).

[137] *E.g.*, Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

[138] For example, several state appellate courts, while recognizing the binding authority of *Kirby*, have nevertheless indicated that they expect police authorities within their respective jurisdictions to provide counsel to suspects placed in preindictment lineups. *See e.g.*, Baker v. State, 498 P.2d 1311 (Nev. 1972); Chandler v. State, 501 P.2d 512 (Okla. Cr. App. 1972). Others have stringently interpreted *Kirby*. *See e.g.*, Arnold v. State, 484 S.W.2d 248 (Mo. 1972); State v. Tingler, 285 N.E.2d 710 (Ohio 1972). One state court has refused to recognize the plurality opinion as binding precedent and has instead held itself bound by *Wade*. *See* People v. Anderson, 205 N.W.2d 461 (Mich. 1973).

In *Johnson v. State*, 284 N.E.2d 517 (Ind. 1972), the majority opinion adopted the holding in *Harris*. But a dissenting judge wrote: "[I] vote to adopt the rule for Indiana, that statements taken in violation of Miranda requirements are inadmissible for impeachment purposes. The State is correct in pointing out to this Court in its brief that we are free to establish stricter constitutional requirements in the reception of evidence than those adopted by the United States Supreme Court. I would do just that in this case." *Id.* at 521 (dissenting opinion of DeBruker, J.). *See also* People v. Hayes, 96 Cal. Rptr. 879 (1st D.C.A. 1971); State v. Boyd, 294 A.2d 459 (Me. 1972).

There appears to be an increasing tendency for state courts in civil cases to resolve novel constitutional issues on both state and federal grounds. *See, e.g.*, Bush v. Reid, 516 P.2d 1215 (Alaska 1973); Brown v. Merlo, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Randone v. Superior Court, 488 P.2d 13, 96 Cal. Rptr. 709

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Whether the Court will move to curb evasion is speculative; the Burger Court, like its predecessors, is unpredictable. Perhaps some checks on evasion will be made, but it should not be forgotten that evasion by use of the adequate state ground rule is perfectly legitimate. It does not involve unlawful defiance of the Court's lawful authority.

Justice Harlan often voiced his belief that criminal justice in this nation should be decentralized, that state criminal procedure should be unhampered by federal constitutional restraints as long as fundamental standards of fairness were adhered to.[139] Chief Justice Burger has expressed the same attitude.[140] The new federalism in criminal procedure arising from the Burger Court's attitude toward criminal suspects suggests that the 1970's may well be the decade in which Justice Harlan's views are in the ascendant.

(Footnote continued from preceding page)
(1971); Jolicoer v. Mihaly, 488 P.2d 1, 96 Cal. Rptr. 697 (1971); Serrano v. Priest, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Blair v. Pitchess, 486 P.2d 1242, 96 Cal. Rptr. 697 (1971); Blocker v. Blackburn, 185 S.E.2d 56 (Ga. 1971); Corley v. Lewless, 182 S.E.2d 766 (Ga. 1971); Haas v. South Bend School Corp., 289 N.E.2d 499 (Ind. 1972); Milliken v. Green, 203 N.W.2d 457 (Mich. 1972); State *ex rel.* Payne v. Walden, 190 S.E.2d 770 (W.Va. 1972).

In Indiana Civil Liberties Union, Inc. v. Indiana War Memorials Comm'n, 291 N.E.2d 888 (Ind.), *cert. denied*, 414 U.S. —— (1973), a civil liberties organization appealed from a judgment which upheld the action of a state commission in denying the organization the use of a public auditorium. The Indiana Supreme Court totally ignored the federal questions raised by the parties and held that the action of the state commission violated the equal protection clause of the Indiana Constitution. 291 N.E.2d at 890. Claiming that the Indiana court had "attempted to preclude review of its decision in the case giving rise to this Petition by failing to rule upon the Federal constitutional questions presented on appeal," the state attorney general filed a petition for writ of certiorari under 28 U.S.C. § 1257. Petitioner's Brief for Certiorari at 7. The petition presented the Supreme Court with the question whether the Indiana court would be permitted to preclude review of its decisions by failing to consider the federal question and instead deciding the question on substantially similar state constitutional grounds. *Id.* at 2-3. The petition was denied. Indiana War Memorials Comm'n v. Indiana Civil Liberties Union, Inc., 414 U.S. —— (1973).

Of course there are some state courts which attempt to avoid Burger Court decisions that vindicate federal rights. *E.g.*, State v. Dickerson, 298 A.2d 761 (Del. 1973); State v. Waddell, 194 S.E.2d 19 (N.C. 1973).

[139] Griffin v. California, 380 U.S. 609 (1965) (concurring opinion of Harlan, J.); Malloy v. Hogan, 378 U.S. 1 (1964) (dissenting opinion of Harlan, J.); Cicenia v. Lagay, 357 U.S. 504 (1958).

[140] California v. Green, 399 U.S. 149 (1970) (concurring opinion of Burger, C.J.).